Nos. 93-517, 93-527, 93-539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, et al.,

Petitioners,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

On Writ of Certiorari to the New York Court of Appeals

BRIEF AMICUS CURIAE OF THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH IN SUPPORT OF RESPONDENTS

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I. INTEREST OF AMICUS CURIAE

The GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH ("GCFA" or "Amicus") an Illinois non-profit corporation, is the central fiscal agency of the denomination and has among its responsibilities the safeguarding of legal interests of the United Methodist Church, an international

protestant religious denomination with approximately 9.7 million members and 42,500 local churches.[1]

For the reasons hereinafter stated, GCFA submits that New York's Chapter 748 amounts to an extraordinary governmental endorsement of a religious sect and thus, represents a classic affront to the Establishment Clause. GCFA's concerns, however, go beyond the four corners of the case below. Although this Court as recently as 1992[2] declined invitations to overrule or qualify the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which has served as the central sign-post of Establishment Clause jurisprudence for 23 years, there is a growing perception that such a step may now be imminent. Indeed, several religious amici view this case as a fulcrum for change and have urged such a course. With due respect to those fellow communions, GCFA submits that abandonment or erosion of *Lemon* would be an error which ultimately would work against the interests of all religious faiths—interests which the First Amendment was created to protect. It thus urges that the decision of the New York Court of Appeals be affirmed; also, that this Court decline, once again, to overrule or modify *Lemon*.

GCFA's position that the interests of religion are best served by adherence to the *Lemon* principles stems from United Methodist tenets and traditions. Since Revolutionary times, these have included a keen distrust of excessive ties between church and state, even where the same are portrayed as benign or accommodative in their purpose.

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[1] Filed with this brief amicus curiae are the consents of counsel for the parties pursuant to the Rules of the Court.

[2] *Lee v. Weisman*, 505 U.S. ____, 120 L.Ed.2d 467, 480 (1992).

Paragraph 74 of the *Book of Discipline* of the United Methodist Church (1992), which contains the constitution, social principles and basic legislation of United Methodism as expressed by its highest judicatory, the General Conference, states, in pertinent part:

> "We believe that the state should not attempt to control the Church, nor should the Church seek to dominate the state. 'Separation of church and state' means no organic union of the two, but does permit interaction. The Church should continually exert a strong ethical influence upon the state, supporting policies and programs deemed to be just and compassionate and opposing policies and programs which are not."
>
> * * *
>
> "[In respect to education] . . . we endorse public policies which ensure access and choice and which do not create unconstitutional entanglements between Church and state. The state should not use its authority to inculcate particular religious beliefs (including atheism) nor should it require prayer or worship in the public schools, but should leave students free to practice their own religious convictions."

The *Book of Discipline* of the United Methodist Church at sub-pars. B, D.

While United Methodism does not maintain a system of parochial schools, various units of the denomination own, sponsor or maintain religious affiliations with a large number of educational institutions, including schools of theology, colleges and universities, junior colleges and secondary or preparatory schools. Numerous local entities, at their discretion, operate their own nursery, elementary and primary education facilities.

The denomination's involvement in these educational programs at all levels does not, however, mean that there is ambivalence regarding financial aid issues and the proper role of government:

> "[United Methodists] . . . do not support the expansion or the strengthening of private schools with public funds. Furthermore, we oppose the establishment or strengthening of private schools that jeopardize the public school system or thwart valid public policy.
>
> "We specifically oppose tuition tax credits or any other mechanism which directly or indirectly allows government funds to support religious schools at the primary or secondary levels. Persons of one particular faith should be free to use their own funds to strengthen the belief system of their particular religious group. But they should not expect all taxpayers, including those who adhere to other religious belief systems, to provide funds to teach religious views with which they do not agree. . . ."

The *Book of Resolutions* of the United Methodist Church (1992) at 469.

II. SUMMARY OF ARGUMENT

Chapter 748, in essence, was a legislative decision ceding administrative and political authority over a school district to a religious group. Few measures can be imagined which would so frontally conflict with the Establishment Clause. The Court below properly applied *Lemon* analysis in concluding that the wall of separation of church and state had been breached. Such a conclusion is reinforced by cases of this Court condemning arrangements whereby governmental power is delegated to churches. The decision below must be affirmed.

A second issue of far-reaching importance is this: whether *Lemon* will be reformulated or overruled. Although criticism of *Lemon* seems to be in vogue among a number of judges, parties, amici and commentators, the chorus of

requests to cast aside this long-standing rule in favor of some other approach must be resisted. *Lemon* is a faithful statement of the core of the Establishment Clause. While it is unsurprising that courts have encountered difficulties in applying the rule in a profusion of constantly shifting factual situations, this does not render the rule bad law or deserving of replacement. Overall, this Court's vigilant upholding of the Establishment Clause through use of the *Lemon* protocols has served this nation—and religious institutions—quite well. As our founding fathers wisely foresaw, the best policy is one which rigorously curbs governmental power over religion and religious power over government as well.

III. ARGUMENT

A. The Decision Below Should Be Affirmed To Remedy A Patent Violation Of The Establishment Clause.

The decision of the New York Court of Appeals was correct, both in its utilization of the *Lemon* test and in its conclusion that the legislature's action was a clear-cut violation of the Establishment Clause. The dominant purpose of Chapter 748 in carving out a public school district coterminous with—and controlled by—the Satmar Hasidic enclave was to submit to the latter's long standing demand—engendered by the customs and precepts of their religion—that they remain separate from the larger society. Thus, the legislation offended the first prong of *Lemon* which insists that "a secular purpose" be present.

Likewise, by granting the Satmar a public school district of their own, subject to the control of their religious authorities, Chapter 748 violated *Lemon*'s second prong, which insists that a measure not have the "primary effect" of advancing religion. This Court has traditionally

maintained a higher level of scrutiny in applying the second prong of the *Lemon* test where, as here, the government's accommodations to a religious sect relate to the education of children. *Edwards v. Aguillard*, 482 U.S. 578, 96 L.Ed.2d 510, 519, 107 S.Ct. 2573 (1987); *McCollum v. Board of Education*, 333 U.S. 203, 227, 231, 92 L.Ed. 649, 69 S.Ct. 461 (1948). While the potential for excessive governmental entanglement with religion (*Lemon*'s third prong) is also present, this factor was not relied upon by the court below, nor need it be examined here to warrant affirmance.

What GCFA finds truly startling about Chapter 748 is the fact that it actually goes so far as to turn over the reins of government to a religious society. This was apparently done by governmental officials to secure peace after a period of rancor and litigation over the Satmar community's insistence that already available public services for its disabled children be specially provided in a Satmar-controlled separate environment. That background, however, does not alter the significance of what was done: allowing a church to exercise governmental powers for its own ends.

While affirmance of the decision below is amply justified on the basis of *Lemon* analysis alone, the transfer-of-powers aspect of this case brings it within the scope of other decisions of this Court which pointedly condemn such a practice. In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 74 L.Ed.2d 297 (1982), this Court struck down a Massachusetts statute delegating to churches the governmental power to veto applications for liquor licenses in close proximity to religious facilities. After applying the *Lemon* analysis, the Court determined that this was an unconstitutional fusion of governmental and religious functions, saying:

> "[The statute] . . . substitutes the unilateral and absolute power of a church for the reasoned decision-making of a public legislative body. . . . The challenged statute thus enmeshes churches in the processes of government and creates the danger of 'political fragmentation and divisiveness on religious lines,' [citation omitted]. Ordinary human experience and a long line of cases teach that *few entanglements could be more offensive to the spirit of the Constitution.*"

459 U.S. at 127 (emphasis added).

To the same effect, see *Walz v. Tax Commissioner of the City of New York*, 397 U.S. 604, 668, 25 L.Ed.2d 697 (1970) (Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious activity".)

Finally, Petitioners seek to portray the State's ceding of secular authority in Chapter 748 as a constitutionally permissible accommodation of religion. (Pet. Br. at 40) There are at least two flaws in this position: First, it is inconsistent with other positions taken in the same brief. Petitioners have repeatedly denied that the Satmar's request for a separate educational program was a function of the group's religious beliefs and practices, characterizing the request as an outgrowth of "cultural" traditions (Pet. Br. at 4, n.1 and 29). If this is so, there is no occasion for invoking a religious accommodation as Petitioners do later in their brief (*Id.* at 40).

The second flaw is that Petitioners misapprehend the scope of those accommodations which this Court, on occasion, has sanctioned as mandatory under the Free Exercise Clause or as incidental, and thus permissible, under the Establishment Clause. Heretofore, it has been settled

that governmental accommodation, to be constitutional, must lift an identifiable burden on religious practice initially imposed by the government itself. *See, e.g., Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). Thus, such permissible accommodations normally take the form of an exemption from laws of general applicability. *E.g., Corporation of Presiding Bishops of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). This burden-lifting characteristic of true accommodations cannot reasonably be equated with Chapter 748, whose whole purpose was to structure a special school district and affirmatively grant governmental power to a religious society.

B. The *Lemon* Rule Is Constitutionally Correct And Must Be Preserved.

An even larger question surrounding this case is whether *Lemon* will be permitted to remain intact. GCFA asserts that it should, and indeed it must, because only *Lemon*, among all the rules formulated by this Court to-date in the religious area, fully mirrors and upholds all the core principles of the Establishment Clause. Contrary to the assertions of some amici, the Court's interpretation of that clause, as construed in tandem with the Free Exercise Clause, has *not* been hostile to religion. Fairly viewed, it has been protective of religion and religious organizations have an interest in ensuring that the Court's interpretation of the Clause is rigorously upheld. The temptation by some amici to loosen or do away with the strictures of *Lemon* is not without its dangers: such a course might bring short-term advantages in the form of enhanced governmental "accommodations" but in the long-term and as more fully set forth below, it could lead to unwelcome consequences.

1. *Lemon* Accurately Expresses The Essential Message Of The Establishment Clause.

Given the frequency of denunciations leveled at the *Lemon* rule in recent years,[3] it would be instructive at the outset to closely compare the *Lemon* test with the actual language of the Establishment Clause. Presumably, such a comparison would reveal how it is that *Lemon*, according to its critics, has strayed so far off course. Such an inspection yields no such result. The Clause is terse, yet eloquent in its simplicity: "Congress shall make no law respecting an establishment of religion . . ." If this language means anything, it is that the role of government in our system is to make laws about predominantly *secular* matters—not religious ones. *See Allegheny County v. ACLU*, 492 U.S. 573, 610 (1989) (Constitution mandates that "government remain secular, rather than affiliate itself with religious beliefs and institutions"). As Justice Jackson put it in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943):

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

Religion was one of these subjects; in fact, it was the first one specified in the Bill of Rights. A comparison of the three *Lemon* elements with the constitutional lan-

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[3] See, for example, assailment of the New York Court's use of *Lemon* as "Orwellian" and "deeply flawed" (Joint Br. of Christian Legal Society et al. at 2, 5). In his concurring opinion in *Lamb's Chapel v. Center Moriches*, 508 U.S. ____, 124 L.Ed.2d 352, 365 (1993), Justice Scalia has likened *Lemon* to a ". . . ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . [and] stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ."

guage hardly supports the thesis that *Lemon* has strayed. To the contrary, *Lemon* is not only harmonious with the constitutional mandate—it is the very embodiment of it. If legislating in the religious realm is forbidden, surely it logically follows that *Lemon* would begin with a requirement that "a secular legislative purpose" be present. 403 U.S. at 612. Nor should it come as any surprise, under the second prong of the *Lemon* test, that the "principle or primary effect neither advances nor inhibits religion." *Id.* Finally, the third prong of the test's preclusion of "excessive government entanglement with religion" is hardly antithetical to the Establishment Clause's basic command. 403 U.S. at 613. In sum, *Lemon is* faithful to the Constitution. It would be impossible to conjure up a comprehensive test which more faithfully captures and implements the intent of the Framers.

2. *Lemon* Principles, Though Complex As Applied, Are Still Workable And Widely Understood.

No constitutional doctrine as thoughtfully fashioned as *Lemon* should be casually discarded. As Chief Justice Burger observed in announcing the *Lemon* test, it represents "the cumulative criteria developed by the court over many years." *Lemon*, 403 U.S. at 612. Perhaps because *Lemon* represents a distillation of the composite wisdom of several generations of distinguished justices, the rule is far better understood and commands more respect among bench, bar and public officials than some commentators are willing to acknowledge. *Lemon*, in fact, is "a convenient formulation of the 'cumulative criteria developed by the court over many years,' " and is but "an elaboration of the fundamental rule that government be neutral with respect to religion." Laycock, *"Non-Coercive" Support For Religion: Another False Claim About The Establishment Clause*, 26 Val. U. L. Rev. 37, 53-54 (1991).

At a time when many simplistic, single-purpose rules are being proposed to take *Lemon*'s place, it is also relevant to consider that *Lemon* has the virtue of being comprehensive and resilient in its operation. History has shown that the range of situations which threaten encroachment on the Establishment Clause is almost boundless. *Lemon* can be adapted to all such situations, whether subtle or extreme. Single-subject tests lack that advantage. As Justice O'Connor stated in *Allegheny County v. ACLU*, 492 U.S. 573 (1989):

> "An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization [citations omitted] but fails to take account of numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of its approval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."

492 U.S. at 627-628 (O'Connor, J., concurring).

Subtle distinctions, leading to judicial frustration and even occasional contradictions, have indeed occurred under *Lemon*, but this is to be expected with any important rule that comes into play in a vast proliferation of cases. GCFA suggests these drawbacks are relatively small compared to the implications of operating without *Lemon* or under a hastily constructed substitute. In short, *Lemon* should be retained because (1) it is a correct statement of the law; and (2) its main features (nuances of application notwithstanding) are widely understood and followed.[4]

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[4] For example, the Westlaw databases reflect that to-date, 745 federal cases have discussed or cited *Lemon*; in addition, 368 state appellate decisions have adverted to the rule. From a *stare decisis* perspective alone, predictability and protection of generated expectations are at stake in this case. Sound policy counsels against the elimination of a rule so deeply entrenched in our jurisprudence.

3. *Lemon*'s Requirement Of Neutrality Is Not Inhospitable To Religion.

Neither is *Lemon* hostile to religion, as some have asserted (e.g., S. Baptist Amicus Br. at 11). In fact, *Lemon* and its progeny, construed in conjunction with Free Exercise jurisprudence, have provided an environment in which religion can and does flourish.[5] An examination of the current legal climate negates such claims of "secularism" and "animosity." First, there is already in place a body of Free Exercise jurisprudence which collectively constitutes a strong barrier against state burdens and encroachments upon religious practice. *See Sherbert v. Verner*, 374 U.S. 398 (1963); and *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("Only those [state] interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"). Most recently, this barrier was reaffirmed and significantly strengthened by passage of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. 2000 bb *et seq.* (1993) ("compelling interest" must be demonstrated before government can substantially burden religious practice; private right of action is conferred).

Second, contrary to the claims of some, *Lemon* does not prevent reasonable accommodations. Both the so-called "mandatory" accommodations dictated by the Free Exercise Clause and the incidental accommodations which do

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[5] According to successive editions of the *Yearbook of American Churches*, church membership in those communions affiliated with the National Council of Churches in the United States during the *Lemon* era (1972 to-date) has increased from 42,763,297 to 48,925,442, or approximately 14.5%. *Yearbook of American Churches*, pp. 195-196 (1970); *Yearbook of American and Canadian Churches*, pp. 261-63 (1993).

not rise to the level of "primarily advancing" religion (*Lemon*'s second prong) are permissible.[6]

This amicus believes that only those who fail to appreciate the importance to all—including churches—of governmental neutrality would flirt with changing the essentially benign constitutional standards which now exist and which accord churches ample room to carry out their missions. Churches need to be reminded that the principles embodied in *Lemon* are not anti-religious; to the contrary, they guarantee religious independence and vitality by guarding against "state-created orthodoxy." *Lee v. Weisman*, *supra*, 112 S.Ct. at 2658.

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[6] *See e.g., Bowen v. Kendrick*, 487 U.S. 589, 101 L.Ed.2d 520, 108 S.Ct. 2562 (1988) (Adolescent Family Life Act, which allowed funding for religious entities to provide range of family counseling services, deemed not violative of the Establishment Cause); *Lamb's Chapel v. Center Moriches*, 508 U.S. ____, 113 S.Ct. 2141 (1993) (church had right to exhibit religious film on public school's premises after school hours); *Wolman v. Walter*, 433 U.S. 229, 247, (1977) (considerations of safety, distance, and the adequacy of accommodations could justify a public school's provision of remedial services in mobile units located on neutral sites near parochial school's premises); *Roemer v. Maryland Public Works*, 426 U.S. 736, 49 L.Ed.2d 179, 96 S.Ct. 2337 (1976) (annual subsidies to qualifying colleges and universities, including religiously affiliated institutions, did not violate the Establishment Clause); *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136, 94 L.Ed.2d 190, 107 S.Ct. 1046 (1987) (state's accommodation of individual's religious preferences by awarding of unemployment benefits to individual despite refusal by individual to work on her Sabbath deemed not to violate Establishment Clause); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 97 L.Ed. 2d 273, 107 S.Ct. 2862 (1987) (federal law exempting religious institutions from ban on religious discrimination in employment held not to violate the Establishment Clause).

4. Overruling Or Reformulating *Lemon* Could Leave A Void Or Even Create Affirmatively Harmful Results.

The prospect of altering *Lemon* or replacing it with some untested new formula is most disturbing to GCFA. It is submitted that none of the various substitute rules which have been brought forward would fill the void left by an overruled *Lemon*. As noted earlier, narrow tests like the proposed "coercion" standard are too limited to cover the myriad ways in which the First Amendment might be encroached upon. This deficiency also applies to the "strict scrutiny" approach suggested by Chief Justice Kaye in her concurrence in the decision below at 81 N.Y. 2d 518, 532 *et seq.* While such a standard is superficially appealing, it does not explain why *Lemon* analysis, alone, fails to suffice. Nor does it discuss the implications of the vacuum which would be left if "strict scrutiny" fully displaced, instead of merely supplemented, *Lemon*.

Petitioners have made an outright bid for deletion of *Lemon*'s "secular purpose" and "primary effect" tests ". . . to the extent that they imply that a legislature may not enact laws that remove impediments to religious observers' equal access to secular governmental benefits" (Pet. Br. at 45). This is pernicious, but not very much more so than the approaches advanced by certain religious amici. For instance, the Southern Baptist Convention, et al., have argued that *Lemon* "feeds confusion" (Br. at 15) and would have this Court replace *Lemon*'s three prongs with a new test containing no fewer than *four* prongs and *seven* subprongs. The confusion likely to be engendered by an abrupt departure from *Lemon* and attempts to follow such a new rule is self-evident.

Likewise, while Professor McConnell and his colleagues in their joint amicus brief on behalf of the Christian Legal

Society, the National Association of Evangelicals, et al., present an earnest and well-argued effort to soften or qualify the second ("primary effect") test of *Lemon* (Br. at 3-6), this approach, too, has a downside. By de-emphasizing "effects" and allowing challenged actions to pass muster despite their actual impact, so long as they are "formally neutral toward religion (or "religion-blind")" (*Id.* at 5), those amici overlook the fact that laws facially "neutral" toward religion can actually operate to advance the latter as surely as laws openly and avowedly intended to accomplish such a result.

This Court's teachings concerning job discrimination and civil rights provide a useful illustration of the defect. For a period of time, employers practicing certain forms of discrimination could avoid accountability by cloaking their actions in "facially neutral employment practices." In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court, in crafting what has become known as the "disparate impact doctrine" held that a plaintiff need not show intentional discrimination in order to establish a violation. Rather, where a *facially neutral practice*, even if adopted without prohibited intent, has an adverse impact on a protected group, this effect is indistinguishable from an intentional discriminatory practice. To the same effect, see *Watson v. Fort Worth*, 487 U.S. 977, 990 (1988). The same rationale applies here where the issue is governmental dispensation of benefits to religion. A "facial neutrality" requirement may not be adequate because a seemingly neutral enactment may indeed mask even flagrant advancements of religion when its true effects are properly considered.[7]

[7] In our view, the case of *Employment Division v. Smith*, 494 U.S. 872, 188 L.Ed.2d 876 (1990), erroneously opted for a formal neutrality rationale, the result being a disparate and adverse impact on established religious practice. This approach sparked the enactment of RFRA, the intent of which was to correct this error.

In conclusion, it is appropriate to ask what would replace *Lemon*, if it were overruled or key parts of the rule removed:

(a) If the Court should delete Test 1, the requirement of "a secular purpose," is this to be taken as meaning that laws may now have a religious purpose?

(b) If the Court should delete Test 2, dealing with "primary effect," is this to be taken as meaning that laws operating to confer major advantages upon religion are now permitted?

(c) Similar questions would surround deletion of the third *Lemon* prohibition of "entanglement."

Clearly, *Lemon* is best left alone. Organized religion should not succumb to the short-term lure of a more beneficent, accommodating government. Instead, it should be mindful of its long-term stake in preserving the splendid balance which has been struck through interaction of the Free Exercise and Establishment Clauses and the *Lemon* case. While tinkering with *Lemon* may not bring about sudden and dramatic changes, it could lead to an insidious encroachment process culminating in the eventual union of civil and ecclesiastical forces. Madison spoke of this as the "silent accumulations and encroachments of ecclesiastical bodies" on the newly emerging democratic government. Madison, *Detached Memoranda* (1832). Much more recently, Chief Justice Burger described the dangers of such a gradual, incremental process in the following terms:

> "A law 'respecting' the . . . establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being *a step that could lead to such establishment* and hence offend the First Amendment."

Lemon, 403 U.S. at 612 (emphasis added).

IV. CONCLUSION

For the reasons stated above, the decision of the New York Court of Appeals should be affirmed. In addition, the Court should decline to overrule or modify the *Lemon* doctrine.

Dated: Chicago, Illinois
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Respectfully submitted,

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